Navigating in the Zone of Confusion— Reflections on Illegal Air Taxi Operations

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This article will not attempt to distinguish between legitimate aircraft operations conducted under Part 91 as opposed to illegal air taxi operations, to the extent the reader might expect to obtain some answers about how to circumvent operation of Part 135. As will be apparent from the discussion which follows, this is an area plagued with uncertainty requiring the exercise of utmost caution and independent judgment.

I. INTRODUCTION

Airmen or aircraft operators who contemplate transporting passengers for compensation or other benefits in an aircraft without an air taxi certificate should be cautioned with respect to the regulatory dangers presented by such a proposed course of action. The area of illegal air taxi operations, in juxtaposition to the legitimate flights of leased aircraft under Part 91 of the Federal Aviation Regulations (FARs)[1], is an area fraught with confusion and uncertainty. Conventional wisdom abounds in the aviation community about the propriety of passengers leasing aircraft and also hiring their own flight crew. Although many aviators, and perhaps some lawyers, believe this to be a legitimate basis for avoiding operation of the requirements of Part 135[2], the Federal Aviation Administration and its lawyers take a dim view of these practices and employ amorphous concepts appearing in the regulations and case law to the FAA's maximum advantage.

II. AIR TAXI REGULATORY UNDERPINNINGS

Part 135 of the Federal Aviation Regulations (FARs)[3] governs "[t]he carriage in air commerce of persons or property for compensation or hire as a commercial operator . . ."[4] Further, Part 135 provides that "[n]o person may operate an aircraft under this Part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appro-

1. 14 C.F.R. § 91 (1992).
2. 14 C.F.R. § 135.1 (1992).
3. 14 C.F.R. § 135.1 (1992).
4. 14 C.F.R. § 135.1(a) (3). Part 135 applies to the carriage of persons in aircraft with a seating capacity of less than 20 passengers or a maximum payload capacity of less than 6,000 pounds or, with respect to flights "entirely within any state of the United States in aircraft having a maximum seating capacity of 30 seats or less or a maximum payload capacity of 7,500 pounds or less." *Id.*

priate operations specifications issued under this Part."[5] Additionally, persons operating aircraft under Part 135 are obligated to comply with its rules.[6]

An air taxi operator is required to have a director of operations,[7] a chief pilot,[8] and a director of maintenance.[9] Additionally, pilots flying for Part 135 operators must receive initial and recurrent pilot training,[10] must complete pilot proficiency checks,[11] and must undergo pilot-in-command line checks.[12]

To the extent that Part 135 applies to "a commercial operator",[13] the FARs define a commercial operator as:

> . . . a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier under the authority of Part 375 of this Title. Where it is doubtful that an operation is for "compensation or hire", the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, an *major enterprise for profit.*[14]

"Operational control" frequently becomes an issue in litigation concerning alleged unauthorized air taxi operations, and this concept means "with respect to a flight, . . . the exercise of authority over initiating, conducting or terminating a flight."[15] Finally, to the extent the FAA asserts that one or more flights were conducted in violation of the requirements of Part 135, the Agency may also assert that the airman operated "an aircraft in a careless or reckless manner so as to endanger the life or property of another."[16]

The FAA has published an Advisory Circular discussing the difference between private carriage as opposed to common carriage of persons or property.[17] The ostensible purpose of this Advisory Circular is to inform "interested segments of industry with general guidelines for determining whether current or proposed transportation operations by air con-

5. 14 C.F.R. § 135.5 (1992).

6. "Each person operating an aircraft in operations under this Part shall — (a) While operating inside the United States, comply with the applicable rules of this chapter. . . ." 14 C.F.R. § 135.3.

7. 14 C.F.R. § 135.39(a) (1992).

8. 14 C.F.R. § 135.39(b) (1992).

9. 14 C.F.R. § 135.39(c) (1992).

10. 14 C.F.R. § 135.293 (1992).

11. 14 C.F.R. § 135.297 (1992).

12. 14 C.F.R. § 135.299 (1992).

13. 14 C.F.R. § 135.1(a)(3) (1992).

14. 14 C.F.R. § 1.1 (1992). (emphasis added).

15. 14 C.F.R. § 1.1 (1992).

16. 14 C.F.R. § 91.13(a) (1992).

17. FAA Advisory Circular No. 120-12A (Apr. 24, 1986), [hereinafter AC120-12A].

stitute private or common carriage."[18] Further, the Advisory Circular states, "Operations that constitute common carriage are required to be conducted under Federal Aviation Regulations Parts 121 or 135. Private carriage may be conducted under FAR Parts 125 or 91, Subpart D."[19] Additionally, the Advisory Circular recites that charges can be made in the context of time-sharing provisions of the FARs but notes that lease agreements are subject to truth-in-leasing clause requirements.[20]

According to the Advisory Circular, "[a] carrier becomes a common carrier when it 'holds itself out' to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it."[21] Further, the Advisory Circular recites that the four elements defining a common carrier consist of, "(1) a holding out of a willingness [sic] to (2) transport persons or property (3) from place to place (4) for compensation."[22]

The holding out may be accomplished by, *inter alia*, (1) "signs and advertising",[23] (2) "through the actions of agents (who) . . . procure passenger traffic from the general public,"[24] (3) developing "a reputation to serve all,"[25] (4) carrying plane loads of passengers, cargo or mail on a charter basis if it so holds itself out,[26] (5) flying charters for only one organization if the organization is open to a significant segment of the public,[27] and (6) providing free transportation to the general public incident to promotions by hotels or casinos.[28]

The Advisory Circular recites that private carriage is "carriage for hire which does not involve 'holding out'."[29] The Advisory Circular further recites that private carriage may be present if one provides transportation "for one or several selected customers, generally on a long-term basis,"[30] and further recites that "[p]rivate carriage has been found in cases where three contracts have been the sole basis of the operator's

18. *Id.* at 1.

19. *Id.*

20. *Id. See* 14 C.F.R. § 91.501 (1992), *formerly codified* at 14 C.F.R. § 91.181 (1989), relating to, *inter alia*, time-sharing and interchange agreements. With reference to truth-in-leasing requirements pertaining to large aircraft, *see* 14 C.F.R. § 91.23 (1992), *formerly codified* at 14 C.F.R. § 91.54 (1989).

21. AC 120-12A, *supra* note 17, at 1.

22. *Id.*

23. *Id.*

24. *Id.* at 2.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

business."[31] Conversely, the Advisory Circular indicates that "[a] carrier operating pursuant to 18 to 24 contracts has been held to be a common carrier because it held itself out to serve the public generally to the extent of its facilities."[32]

In its continued discussion of the distinction between private and common carriage, the Advisory Circular recites that if an entity is a common carrier in a certain field but contends it engages in private carriage in another field, it "must show that the private carriage is clearly distinguishable from its common carriage business and outside the scope of its holding out."[33]

Finally, the Advisory Circular recites that "only in rare instances could carriage engaged in by a common carrier be legitimately classified as private."[34] The Advisory Circular concludes by advising persons to "look cautiously at any proposal of revenue-generated flights which most likely would require certification as an air carrier,"[35] and invites persons "to discuss their proposed operation with the Regional Counsel of the FAA . . . in which it intends to establish its principal business office."[36]

III. A Review of Cases and Other Materials Involving Illegal Air Taxi Operations as Opposed to Legitimate Aircraft Leasing

A. The NTSB Has Held that a Pilot Can Be a Commercial Operator

Even though Part 135 applies only to "[t]he carriage in air commerce of persons or property for compensation or hire as a *commercial operator*"[37] and even though the regulation defining a commercial operator purports to exclude operations unless they are "a major enterprise for profit,"[38] the National Transportation Safety Board declared that a pilot was a commercial operator in *Administrator v. Jones*.[39] In *Jones*, the airman possessed an airline transport rating and had at one time held an ATCO operating certificate.[40] However, at the time period pertinent to the case, the airman worked as the airport manager and served as a part-time corporate pilot for two corporations including Wells Sales Company

31. *Id.*
32. *Id.*
33. *Id.* at 3.
34. *Id.*
35. *Id.*
36. *Id.*
37. 14 C.F.R. § 135.1(a)(3) (1992) (emphasis added).
38. 14 C.F.R. § 1.1.
39. Administrator v. Jones, 2 N.T.S.B. 1869 (1975).
40. *Id.*

("Wells").[41] When Jones was approached by a former customer with reference to providing air transportation, he advised that he no longer held an air taxi certificate.[42] The customer then requested that Jones inquire as to whether or not Wells would permit use of its aircraft in connection with flying several directors of the customer's company to a meeting.[43] Wells acceded to the pilot's request on behalf of his former customer, and the pilot consulted with counsel prior to conducting the flights and was advised "that such an operation would not be in contravention of the regulations."[44]

After completing the two flights, the pilot invoiced the customer, since Wells was not in the air taxi business.[45] The pilot prepared the invoices, delivered them to the customer and received checks in full payment, which he deposited in his account.[46] The pilot then wrote a personal check on his account to Wells representing the difference between the total amount charged and his fee for pilot services.[47]

The Agency sought to suspend the airman's certificate for 180 days asserting that he had flown an aircraft for compensation or hire when he did not possess an ATCO operating certificate.[48] Following an evidentiary hearing, Judge Davis rejected the airman's argument that he was not a "commercial operator"[49] and reduced the period of suspension from 180 days to 30 days.[50] The Board affirmed, rejecting the airman's argument that he was not a commercial operator since these activities were not a "major enterprise for profit,"[51] the Board observing that the pilot "was not only the pilot-in-command, but was also instrumental in making the arrangements for the flights and in billing, collecting and distributing the fees therefor."[52]

Members McAdams and Haley dissented advancing the better-reasoned argument, which was as follows:

> The certification requirement contained in Section 135.9[53] was intended to apply solely to entrepreneurs who engaged in commercial operations and not to pilots employed by such commercial operators. Otherwise, Section

41. *Id.*
42. *Id.* at 1870.
43. *Id.*
44. *Id.* at 1871.
45. *Id.* at 1870.
46. *Id.*
47. *Id.*
48. *Id.* at 1869. The basis for the Administrator's charge was 14 C.F.R. § 135.9, which is now found at 14 C.F.R. § 135.5. *Id.*
49. Administrator v. Jones, 2 N.T.S.B. 1869, 1873 (1976).
50. *Id.* at 1875.
51. *Id.* at 1870.
52. *Id.* at 1871.
53. Now codified at 14 C.F.R. § 135.5 (1992).

> 61.139 FAR, which sets out the privileges and limitations applicable to the holder of a commercial pilot certificate, would be meaningless. While Part 135 does, in some respects, regulate the qualifications and operating practices of pilots of air taxi and commercial flights, it is clear that there was no intent to require each pilot-in-command of such a flight to possess an ATCO certificate.
>
> When the complicated arrangements surrounding these flights are untangled, it can be seen that respondent was merely serving as the pilot-in-command of an aircraft owned by Wells in his capacity as Wells' corporate pilot. In other words, we conclude that respondent did not "operate" these flights within the meaning of Section 135.9.[54]

Query, would the outcome in *Jones* have been the same if the customer had leased the aircraft directly from Wells and if the customer had made payments separately to Wells and to the pilot?

In *Administrator v. Graves and Davis Air Service*,[55] the Board, again, declared that it was the pilot's responsibility to possess an ATCO certificate on a rental flight. In *Graves*, a pilot recently employed by Davis Air Service undertook a round trip flight, but the aircraft crashed, and there were no survivors.[56] The pilot had been previously employed by another air taxi operator but had not been qualified under Part 135 before commencing the flight.[57] The record indicated that Davis Air Service undertook to contact the customers before the flight when it discovered that a qualified pilot would not be available.[58] Because Davis Air Service was unsuccessful in contacting the customers, when they appeared at the airport on the day of the proposed flight, the pilot was told to advise the passengers that they could either reschedule the flight or rent the plane and make their own arrangements with him.[59] The pilot spent 5 to 10 minutes before the flight discussing the situation with the passengers, and the air taxi operator collected no payment for the flight in advance, nor was a manifest prepared in accordance with the operations manual required for air taxi flights.[60]

Based upon this evidence, Judge Faulk found that the flight was a rental operation and dismissed the charges against the air taxi operator arising out of this incident.[61] The Board, in affirming Judge Faulk's dismissal of those charges, made the following observation:

> The Administrator also raises two legal objections to the law judge's conclusion that this was not an air taxi flight by respondent. First he asserts that the

54. *Id.* at 1872.
55. Administrator v. Graves and Davis Air Service, 3 N.T.S.B. 3900 (1981).
56. *Id.*
57. *Id.* at 3900-3901.
58. *Id.* at 3901.
59. *Id.*
60. *Id.*
61. *Id.* at 3901, 3908.

> flight cannot be considered a rental operation because the passengers were not themselves pilots. However, apart from an opinion to that effect by one of his witnesses, the Administrator has cited no authority for the proposition that a non-pilot cannot rent an aircraft, and we are unaware of any such authority. Secondly, the Administrator argues, citing *Administrator v. Sabar*, N.T.S.B. Order EA-1528 (Jan. 26, 1981), that even if this was a rental operation, Part 135 would nevertheless apply to it under section 135.1(a)(3) (sic) since the pilot would have been transporting passengers for hire. The Administrator's argument overlooks the fact that if this were a rental operation to which Part 135 applied, *the pilot*, not respondent, would have had the duty of compliance with the requirements of that Part.[62]

To the extent the Board affirmed Judge Faulk in *Graves*, was it on the basis that the 5- or 10-minute conversation between the pilot and the customers when they were alerted to the fact that the aircraft could not be flown on behalf of the pilot's employer thereby rendering the flight "private carriage", the air carrier's "holding out" to the public notwithstanding?

Alternatively, can it be said that the basis for Judge Faulk's decision and the Board's affirmance in *Graves* relied on the fact that Davis Air Service had no "operational control" over the flight? Also, if this second explanation is considered, one must bear in mind that that aircraft had been maintained and fueled by Davis Air Service before the crash, and one must assume that Davis Air Service would have received compensation for use of the aircraft had it returned from the flight. It is in this light that the issue of operational control must be considered.

Administrator v. Patterson,[63] involved an air taxi operator who shared office space with some pilots.[64] Eastern Metro Express had, essentially, a rental agreement with Patterson whereby Patterson made an aircraft available on a steady basis for when Eastern Metro Express needed to transport parts or a mechanic.[65] After each flight, Patterson and the pilot would invoice Eastern Metro Express separately.[66] There was no evidence that the pilots were subject to Patterson's influence in conducting the flights.[67] This resulted in a finding by Judge Faulk which reversed the order revoking Patterson's air taxi certificate, since it was determined that Patterson lacked *operational control* over these flights.[68]

Examining the record before it, the Board affirmed Judge Faulk and

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62. *Id.* at 3901 n.3 (emphasis added).

63. Administrator v. Patterson, N.T.S.B. Order No. EA-3762 (1993). Mr. Patterson was represented by Gerrald Cunningham, Esq. of Atlanta, Georgia.

64. *Id.* at 2.

65. *Id.*

66. *Id.* at 2-3.

67. *Id.* at 2.

68. *See* Administrator v. Patterson, NTSB Docket No. SE-10608, at 13 (Initial Decision by Faulk, Judge).

held: "[w]e agree with the law judge that this evidence simply does not show operational control by the respondent of the Eastern Metro Express flights."[69]

Although the FAA argued on appeal that the "two check routine" did not eliminate operational control[70], the Board nevertheless affirmed observing: "However, neither does the 'two check routine' indicate guilt."[71] Finally, the FAA argued "that some individuals within Eastern Metro Express believed they were getting air transportation rather than rental."[72] The Board dismissed this argument observing: "While the Board has considered such a factor in connection with determining whether certain flights were made for compensation or hire, see, e.g., *Administrator v. Southeast Air*, 4 NTSB 517 (1982), we do not think that this type of evidence is particulary relevant to the resolution of *control issues*."[73]

The decision in *Patterson* illustrates sound reasoning by Judge Faulk and by the Board. However, it is unsettling that the Administrator even sought to pursue the matter given that the respondent so clearly lacked the requisite control over the pilots.

B. *The Board Has Held that Pilots Are Not Required to Make a Profit, the Regulations on this Subject Notwithstanding*

Even though Part 135 applies only to a commercial operator,[74] and even though a "commercial operator" embraces "the carriage by air . . . (which is) a major enterprise for profit,"[75] the Board has declared in at least three cases that there is no requirement that the pilot make a profit in order to suffer a violation for alleged operations in violation of Part 135: *Administrator v. Lewis*;[76] *Administrator v. Rountree*;[77] and *Administrator v. Motley*.[78]

In *Lewis*, a commercial pilot received $80 for two round trip flights indicating he did not believe Part 135 applied "where expense sharing was involved."[79] Because the airman invested a considerable sum of money in purchasing two aircraft in order to conduct operations legally and obtained the necessary operating certificate following the flights,

69. Administrator v. Patterson, N.T.S.B. Order No. EA-3762 (1993) at 13.
70. *Id.* at 3 n.4.
71. *Id.*
72. *Id.* at 3.
73. *Id.* (emphasis added).
74. 14 C.F.R. § 135.1(a)(3) (1992).
75. 14 C.F.R. § 1.1 (1992).
76. Administrator v. Lewis, 3 N.T.S.B. 400 (1977).
77. Administrator v. Rountree, 2 N.T.S.B. 1712 (1975).
78. Administrator v. Motley, 2 N.T.S.B. 178 (1973).
79. *Lewis*, 3 N.T.S.B. at 402.

Judge Woodlock imposed no sanction and overruled the FAA's 90-day order of suspension.

Reversing Judge Woodlock and imposing a 30-day suspension of the airman's certificate, the Board declared:

> Respondent maintained that the payment for the flights represented the incurred expenses and he apparently believed that *profitability* was a necessary component of compensation. It is well settled, however, that there can be compensation where the payment covers only cost and no actual profit is derived . . . We therefore conclude that an ATCO operating certificate was a prerequisite to the flight and respondent was in violation of section 135.3(a) and 135.9 of the FAR (sic).[80]

Rountree is testament to the adage that "no good deed goes unpunished." Buck Owens, a well-known entertainer, was in need of transportation for himself and his party from Bakersfield to Los Angeles, California.[81] Two aircraft were employed for this purpose, a Cessna 182, which was on an air taxi certificate and a Cessna 310, which was not.[82] An invoice was submitted to Buck Owens Enterprises by Rountree Flying Service for $216, the invoice including the phrase "air taxi".[83] Although Rountree claimed that the Cessna 310 was flown "on a cost or below cost basis",[84] the Board nevertheless affirmed a 15-day suspension of his certificate for flying without a flight check[85] and careless or reckless aircraft operations.[86]

In affirming Judge Geraghty's order reducing the 30-day suspension sought by the FAA to 15 days, the Board declared:

> Even if we were to accept respondent's claim that the Cessna 310 flight was billed on a cost basis, rather than the regular charter rate, we would, nevertheless, find that said flight was operated for compensation. Without reaching the question of whether the expectation of future economic benefit in itself is a form of compensation, it is well settled that there can be compensation where the payment covers only costs and no actual *profit is shown*.[87]

In *Motley*, the FAA sought to revoke the airman's commercial pilot certificate where (1) on five occasions, he carried human remains for compensation in an aircraft, (2) he carried three passengers for hire from Beaufort to Florence, South Carolina and returned, and (3) he allowed parachute jumping from his aircraft on two occasions without first estab-

80. *Id.* at 401 (emphasis added).

81. *Rountree,* 2 N.T.S.B. at 1713.

82. *Id.*

83. *Id.*

84. *Id.*

85. The Board referenced 14 C.F.R. § 135.38(b) (1975) now found at 14 C.F.R. § 135.293 (1992).

86. *See* 14 C.F.R. § 91.13 (1992); 14 C.F.R. § 91.9 (1975); *Rountree,* 2 N.T.S.B. at 1714.

87. *Rountree*, 2 N.T.S.B. at 1713-1714 (emphasis added).

lishing contact with the nearest FAA facility.[88] The FAA claimed that the airman had conducted flights for compensation or hire without the requisite ATCO certificate in violation of the then FAR section 135.9.[89] The airman argued that there was "no systematic operation or showing of profit or public 'holding out' of services . . . to support (the) violation."[90]

Rejecting the arguments advanced by the airman and affirming a 180-day suspension of his commercial pilot's certificate, the Board declared:

> Respondent quoted the $60 price to his passengers and there is no evidence other than his testimony to indicate that it was insufficient to cover the cost of the flight. Further, the Courts have held that *no actual profit need be shown* to constitute compensation or hire; it is sufficient that the pilot be furthering his economic interests through the operation.[91]

Lewis, *Rountree*, and *Motley* all indicate that the Board has ignored pleas of airmen that they are not commercial operators, the definition of this term with respect to "a major enterprise for profit"[92] in the regulations notwithstanding. The Board has declared that the profit element is satisfied in every case where a pilot receives compensation or flies with the expectation of economic gain in situations where passengers and/or property are transported. The FAA's burden of proof with reference to establishing that the pilot was a "commercial operator"[93] has thereby been greatly reduced. More importantly, a valuable defense to the pilot has been eliminated.

C. THE PUBLIC AIRCRAFT ARGUMENT

In *Administrator v. Sexauer*,[94] officials of the City of Perryville, Missouri, were provided transportation on an *ad hoc* basis utilizing the pilots and the aircraft that happened to be available at that particular time.[95] In response to an action by the Agency to revoke the airman's commercial pilot certificate, he argued that the operations related to public aircraft which were exempt from the requirements of Part 135.[96] Citing *United States v. Aerospace Lines, Inc.*,[97] the Board observed that in that case, the aircraft "was used exclusively by the governmental agency for an ex-

88. Administrator v. Motley, 2 N.T.S.B. 178, 179 (1973).
89. *Id.* The equivalent of former 14 C.F.R. § 135.9 (1973) is now found at 14 C.F.R. § 135.5 (1992).
90. *Id.* at 178.
91. *Id.* at 180 (emphasis added).
92. 14 C.F.R. § 1.1 (1992).
93. 14 C.F.R. § 135.1(a)(3) (1992).
94. Administrator v. Sexauer, 5 N.T.S.B. 2456 (1987).
95. *Id.* at 2456-2457.
96. *Id.* at 2456.
97. United States v. Aerospace Lines, Inc., 361 F.2d 916 (9th Cir. 1966).

tended period (10 months) under a contract which provided that the plane (modified for governmental use) and the crew were under the government's control."[98]

Accordingly, the Board rejected the argument that the flights concerned public aircraft, finding that the airman had violated pertinent provisions of Part 135 and affirming a revocation of his commercial pilot certificate.[99]

D. Expense Sharing as a Defense

The NTSB has decided several cases concerning the "sharing of expenses" by a private pilot with his passenger[s] allowed by the Federal Aviation Regulations.[100]

In *Administrator v. Sabar*,[101] Dr. Fairbairn, after being quoted a fee of $1,000 by various charter outfits to transport his family, spoke with his friend Dr. Renner, who suggested that a call be made to the airman.[102] When Dr. Fairbairn contacted the airman, there was discussion about a cost of $12 per hour for a pilot.[103] However, a charge of $680 was finally negotiated with the doctor's check being payable to Associates Flying Club for the purpose as indicated on the check of a charter flight from Denver, Colorado to Dubois, Wyoming and return.[104] The airman flew the doctor and his family to Dubois, and another pilot who received no compensation and was ignorant of the financial arrangements, transported the doctor and his family to Denver on the return trip.[105] Although the airman who flew the doctor and his family to Dubois claimed it was his intention that the flight be one where the expenses would be shared and/or where he would charge the doctor $12 per hour for flight instruction,[106] Judge Geraghty found that the airman "did hold himself out to be operating as a charter pilot for purposes of taking Dr. Fairbairn and his family to Dubois and returning them from Dubois to Denver.[107] Further, the Judge found that there was no indication as to what respondent Sabar's share of the

98. *Sexauer*, 5 N.T.S.B. at 2457.

99. *Id.*

100. *See* 14 C.F.R. § 61.118(b)(1992); *see also* cases cited *infra* notes 111-115.

101. Administrator v. Sabar, 3 N.T.S.B. 3119 (1980).

102. *Id.* at 3123.

103. *Id.* at 3124.

104. *Id.*

105. *Id.* at 3124, 3127; *see also* Administrator v. Conahan, N.T.S.B. Order No. EA-4044 (Dec. 14, 1993), at 17 (board affirming an initial decision exonerating a pilot charged with violating Part 135); Administrator v. Fulop, N.T.S.B. No. EA-2730 (1988) (where the pilot was told by his employer that the carge was owned by the employer company, and the flights were governed by Part 91, not Part 135). Mr. Conahan was represented by Mark T. McDermott, Esq. and Peter J. Wiernicki, Esq. of Washington, D.C.

106. *Sabar*, 3 NTSB at 3126.

107. *Id.* at 3129.

expenses was to be. The entire cost of the trip was born by Dr. Fairbairn . . . ."[108]

Finding that Mr. Sabar was in violation of Part 135, Judge Geraghty nevertheless reduced the period of suspension from 180 days to 120 days,[109] but the Board reduced the period of suspension to 30 days observing, "It would ignore the reality of this transaction to assume that this respondent did anything to undermine the general public's or Dr. Fairbairn's reliance on the high degree of care and judgment to be expected of commercial operators, as the Administrator appears to suggest through, among other things, urging such a severe sanction."[110]

The *Sabar* case demonstrates that contentions of shared expenses and flight instruction must be *bona fide*. More interestingly, the case is significant to the extent the Board directed a substantial reduction in sanction to the extent the record demonstrated that Dr. Fairbairn appreciated he was not purchasing the services of an air taxi operator.

In *Administrator v. Carter*,[111] the respondent, upon the request of an acquaintance, transported the acquaintance's sick father from Imperial, Nebraska, to Lincoln, Nebraska for admission to a hospital for a medical emergency. The NTSB concluded that even though the respondent had never "held himself out as available to perform such a flight for compensation or otherwise," it was

> clear that the respondent and his friend's sick father had no common purpose in flying to Lincoln . . . and that his transporting of that individual . . . was not incidental to a previously planned, though unscheduled, trip to enable respondent to have his aircraft radio checked out. Finally, respondent's essentially admitted subsequent efforts to recover, as had apparently been promised to him, the *full* cost of the trip precludes any conclusion that the flight falls within the only regulatory exception ot the prohibition against a private pilot's acceptance of payment for a flight; namely, where the expenses of a trip are *shared* with passengers. *See* 61.118 (b).[112]

The Board, citing *Sabar* and *Administrator v. Jones*,[113] recognized that the respondent was forced with making a difficult choice in accommodating the desires of a friend when it reduced the respondent's suspension from 180 to 30 days.[114] It however stressed the importance of "compliance with regulations despite the difficult choices that strict adher-

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108. *Id.*

109. *Id.* at 3132.

110. *Id.* at 3121.

111. Administrator v. Carter, N.T.S.B. Order No. EA-3730 (Nov. 6, 1992). Mr. Carter was represented by Mr. J. Scott Hamilton, Esq. of Louisville, CO.

112. *Id.* at 6-7.

113. Administrator v. Jones, 2 N.T.S.B. 1869 (1975).

114. *Carter*, N.T.S.B. Order No. EA-3730 at 7-8.

ence to them may occasionally entail."[115]

E. Private Carriage Versus Public Carriage in the Context of Time Sharing and Interchange Agreements

Subpart F (formerly Subpart D) of the FARs permits the operation of large and turbine-powered multi-engine airplanes under Part 91 as opposed to Parts 121, 125, 129, 135 and 137.[116] Although such aircraft may be operated under Part 91, the authorization to engage in such operations is only valid "when common carriage is not involved."[117] Subject to that important qualification, Subpart F permits, *inter alia*, demonstration flights,[118] and "[t]he carriage of company officials, employees and guests of the company on an airplane operated under a time-sharing, interchange or joint ownership agreement as defined in paragraph (c) of (Section 91.501)."[119]

A time-sharing agreement defined by Subpart F means "an arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in paragraph (d) of (Section 91.501)."[120]

An interchange agreement means "an arrangement whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person's airplane, and no charge, assessment or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating and maintaining the two airplanes.[121]

With respect to, *inter alia*, demonstration flights and time-sharing flights, the following may be charged as expenses for a specific flight:

(1) Fuel, oil, lubricants and other additives.
(2) Travel expenses of the crew, including food, lodging and ground transportation.
(3) Hangar and tie-down costs away from the aircraft's base of operation.
(4) Insurance obtained for the specific flight.
(5) Landing fees, airport taxes and similar assessments.
(6) Customers, foreign permit and similar fees directly related to the flight.
(7) Inflight food and beverages.
(8) Passenger ground transportation.
(9) Flight planning and weather contract services.

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115. *Id.*
116. 14 C.F.R. § 91.501(a), (b) (1992).
117. 14 C.F.R. § 91.501(b) (1992).
118. 14 C.F.R. § 91.501(b)(3) (1992).
119. 14 C.F.R. § 91.501(b)(6) (1992).
120. 14 C.F.R. § 91.501(c)(1) (1992).
121. 14 C.F.R. § 91.501(c)(2) (1992).

(10) An additional charge equal to 100% of the expenses listed in paragraph (d)(1) of this section [sic].[122]

F. *Truth-in-Leasing Requirements as Related to Large Aircraft*

Section 91.23 of the FARs[123] imposes certain obligations on "the parties to a lease or contract of conditional sale involving U.S.-registered large aircraft entered into after January 2, 1973."[124] With respect to such aircraft, it is mandatory that a written lease or contract be executed and that it include "a written truth-in-leasing clause as a concluding paragraph in large print, immediately preceding the space for the signature of the parties."[125] The truth-in-leasing clause must contain the following information:

(1) Identification of the Federal Aviation Regulations under which the aircraft has been maintained and inspected during the 12 months preceding the execution of the lease or contract of conditional sale, and certification by the parties thereto regarding the aircraft's status of compliance with applicable maintenance and inspection requirements in this part for the operation to be conducted under the lease or contract of conditional sale.
(2) The name and address (printed or typed) and the signature of the person responsible for *operational control* of the aircraft under the lease or contract of conditional sale and certification that each person understands that person's responsibilities for compliance with applicable Federal Aviation Regulations.
(3) A statement that an explanation of factors bearing on operation control and pertinent Federal Aviation Regulations can be obtained from the nearest FAA Flight Standards district office [sic].[126]

Certain leases or contracts of conditional sale are exempt from truth-in-leasing requirements, i.e., (1) if the party to whom the aircraft is furnished is a foreign air carrier or certificate holder under Part 121, 125, 127, 135 or 141; (2) if the party furnishing the aircraft is a foreign air carrier, certificate holder under Part 121, 125, 127 or 141 or is a Part 135 certificate holder having authority to engage in air taxi operations with large aircraft; and (3) if it involves a contract of conditional sale "when the aircraft involved has not been registered anywhere prior to the execution of the contract, except as a new aircraft under a dealer's aircraft registration certificate issued in accordance with § 47.61 of (the FARs)."[127]

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122. 14 C.F.R. § 91.501(d)(1)-(10) (1992). The punctuation is that found in the original text of the regulation.

123. 14 C.F.R. § 91.23 (1992).

124. 14 C.F.R. § 91.23(a) (1992). "*Large aircraft* means aircraft of more than 12,500 pounds, maximum certificated takeoff weight." 14 C.F.R. § 1.1 (1992).

125. *Id.*

126. 14 C.F.R. § 91.23(a)(1)-(3) (1992) (emphasis added). The punctuation is that found in the original text of the regulation.

127. 14 C.F.R. § 91.23(b)(1)(i), (ii) (1992); 14 C.F.R. § 91.23(b)(2) (1992).

The truth-in-leasing requirements which pertain to large civil aircraft of the United States Registry prohibit operation of the aircraft subject to a lease or contract of conditional sale unless the following conditions are satisfied:

(1) The lessee or conditional buyer, or the registered owner if the lessee is not a citizen of the United States, has mailed a copy of the lease or contract that complies with the requirements of paragraph (a) of this section within 24 hours of its execution, to the Aircraft Registration Branch, Attn: Technical Section, P.O. Box 25724, Oklahoma City, Oklahoma 73125;
(2) A copy of the lease or contract that complies with the requirements of paragraph (a) of this section is carried into the aircraft. The copy of the lease or contract shall be made available for review upon request by the Administrator, [sic] and;
(3) The lessee or conditional buyer, of the registered owner if the lessee is not a citizen of the United States, has notified by telephone or in person, the FAA Flight Standards District Office, nearest the airport where the flight will originate. Unless otherwise authorized by that office, the notification shall be given at least 48 hours before takeoff in the case of the first flight of that aircraft under that lease or contract and inform the FAA [sic]
(i) The location of the airport of departure;
(ii) The departure time; and
(iii) The registration number of the aircraft involved.[128]

Further, the truth-in-leasing provisions of the FARs indicate that the commercial or financial information contained in the lease or contract is privileged by reason of which it "will not be made available by the FAA for public inspection or copying under 5 U.S.C. 552(b)(4) [sic] unless recorded with the FAA under Part 49 of (the FARs)."[129]

Finally, under the truth-in-leasing provisions of the FARs, a lease is defined as "any agreement by a person to furnish an aircraft to another person for compensation or hire, whether with or without flight crew members, other than an agreement for the sale of an aircraft and a contract of conditional sale under section [sic] 101 of the Federal Aviation Act of 1958. The person furnishing the aircraft is referred to as the lessor, and the person to whom it is furnished the lessee."[130]

G. Literature Promulgated by the FAA Which Impacts on Truth-in-Leasing Requirements

The FAA has promulgated an Advisory Circular[131] and an Order[132] which relate to the obligations of the aircraft operator and the Agency in

128. 14 C.F.R. § 91.23(c)(1)-(3), (i), (ii), (iii) (1992).
129. 14 C.F.R. § 91.23(d) (1992).
130. 14 C.F.R. § 91.23(e) (1992).
131. FAA Advisory Circular AC No. 91-37A, (Jan. 16, 1978) [hereinafter AC 91-37A].
132. FAA Order No. 8720.1A (Sept. 25, 1979) [hereinafter Order 8720.1A].

the context of large civil aircraft operated under Part 91. AC 91-37A recites that "[t]here have been instances wherein users of charter aircraft became the victims of certain operators."[133] Further, it recites that "[i]n many instances lessees and conditional buyers of aircraft did not realize that they were legally responsible for operational control of the aircraft as defined in Part 1 of the . . . FARs."[134] Further, it recites that, "[t]his evasion of compliance made it appear that the lessees and conditional buyers were responsible for *operational control*, when in fact they did not have that responsibility."[135]

The Advisory Circular alludes to charter flights,[136] air taxi and commercial operators,[137] and to FAA proficiency standards which relate to scheduled air carriers,[138] and observes that "there are . . . dozens of other companies or individuals who have no operator's certificate but who are willing, for the sake of profit, to violate the law by evading safety requirements. Before you sign for a charter, ask to see the air carrier, commercial operator or air taxi operating certificate issued by the FAA."[139]

After making reference to definitions of a lease,[140] a conditional sale,[141] a conveyance,[142] a large aircraft [sic] in excess of 12,500 pounds maximum certificated takeoff weight,[143] what it means to operate an aircraft,[144] and the concept of "operational control",[145] the Advisory Circular distinguishes between a "wet lease" and a "dry lease."[146] The Advisory Circular describes "wet leases" as being leases in which the lessor provides both the aircraft and the crew while leasing an aircraft without the crew is considered to be a "dry lease."[147] The author of the Advisory Circular is J. A. Ferrarese, Acting Director, Flight Standards Service.[148] In the Advisory Circular, Mr. Ferrarese concedes that dry leasing versus wet leasing is not a clear dichotomy, since he wrote as follows:

> Normally, in the case of a "dry lease", the lessee exercises operational control of the aircraft. Conversely, in a "wet lease", the lessor normally exer-

133. AC 91-37A, *supra* note 131, at para. 3.
134. *Id.* at para. 3(a).
135. *Id.* at para. 3(b) (emphasis added).
136. *Id.* at para. 3(c).
137. *Id.* at para. 3(d).
138. *Id.* at para. 3(e).
139. *Id.* at para. 3(f).
140. *Id.* at para. 4(a).
141. *Id.* at para. 4(b).
142. *Id.* at para. 4(c).
143. *Id.* at para. 4(d).
144. *Id.* at para. 4(e).
145. *Id.* at par. 4(f).
146. *Id.* at par. 5.
147. *Id.*
148. See *id.* at 7, which is signed "J. A. Ferrarese, Acting Director, Flight Standard Service."

> cises operational control. The determination of each situation as to whether the lessor or lessee exercises operational control requires consideration of all relevant factors present in each situation. The terms of the lease itself are important but since they may not reflect the true situation, the actual arrangements and responsibilities should be given very careful consideration.
>
> There may be situations during which the lessor provides both the aircraft and the flight crew (pilots, flight engineers and flight navigators) but the lessee provides the cabin crew (flight attendants). In this case the lease would be considered a "wet lease." On the other hand, when the lessor provides the aircraft and the lessee provides the flight crew and the cabin crew, it would be considered a "dry lease".[149]

The Advisory Circular signed by Mr. Farrarese indicates that "WHEN YOU 'DRY LEASE' AN AIRCRAFT FOR YOUR USE, YOU NORMALLY BECOME THE AIRCRAFT OPERATOR. Conversely, when you 'wet lease' an aircraft, the lessor is normally the aircraft operator."[150] Further, Mr. Farrarese wrote:

> When dry leasing, you do not need an FAA-issued operator's certificate as long as you do not carry persons or property for compensation or hire . . . .
>
> Wet leasing aircraft is a common and approved practice, carried out by hundreds of legitimate organizations. Unfortunately, there are some irresponsible companies which may use various ways to confuse the issue concerning who is the actual aircraft operator. For example, the sham "dry lease" has been used, whereby you are provided with an aircraft on a lease basis, although it is actually serviced and flown by the leasing company. Such an arrangement (depending upon the terms of the lease) may make you the operator of the aircraft, although you do not intend this and have in fact assumed no operational responsibilities.
>
> Some groups seeking charter services may knowingly enter into an evasively worded arrangement, if the price is made attractively low. If you are tempted to do so, consider that if you accept what amounts to charter service from a company that is not certificated to operate charters, you may forego the protection of certain safety standards required by the FAA. *You may also violate the law.*[151]

Although the author of the Advisory Circular opines that "[p]ersonnel from an FAA general aviation district office, air carrier district office of flight standards district office will gladly explain the factors bearing on responsibility for operational control and the pertinent FARs,"[152] the discussion on operational control is further confused to the extent the Advisory Circular recites that "operational control may in fact remain with the lessor even though the lease is characterized as a 'dry lease' and expressly states that items such as flight following, dispatch, communica-

149. *Id.* at par. 5(a)(b).

150. *Id.* at par. 6.

151. *Id.* at par. 6(a), (b), (c) (emphasis added.)

152. *Id.* at par. 8.

tions, weather and fueling are to be performed by the lessee."[153]

The Advisory Circular indicates that "[w]here a lease agreement is not clear in regard to *operational control* of the aircraft, the FAA may ask the parties to amend the lease to properly reflect the party having *operational control*."[154] Additionally, the Advisory Circular states the following:

> Insofar as our safety regulations are concerned, the FAA has taken the position that if a person leases an aircraft to another and also provides the flight crew, fuel and maintenance, the lessor of the aircraft is the operator. If the lessor makes a charge for the aircraft and services, other than as provided in Subpart D to Part 91,[155] the operation of the aircraft, is subject to FAR Parts 121, 123, 127, 129 or 135 depending on the type or size of the aircraft.[156]

The Advisory Circular discusses the necessity of sending a copy of the lease or conditional sale contract to the FAA in accordance with truth-in-leasing requirements,[157] but indicates that "[f]iling a lease or contract of conditional sale under FAR section 91.54[158] to satisfy 'truth-in-leasing' requirements does *not* constitute filing under FAR Part 47 or Part 49 to register the aircraft, or to record public notice,"[159] since the document must also be recorded with "the FAA Aircraft Registry, P.O. Box 25504, Oklahoma City, Oklahoma 73125."[160]

The Advisory Circular reiterates the obligation to give notice to an appropriate FAA office at least 48 hours prior to the first flight of an aircraft subject to truth-in-leasing requirements[161] and contains a sample truth-in-leasing clause.[162]

Order 8720.1A is signed by Kenneth S. Hunt, the Director of Flight Operations, Federal Aviation Administration, and concerns truth-in-leasing notification.[163] The Order indicates that no purpose may be served by a ramp inspection if the owner is known "to have a good compliance and safety record."[164] However, in the context of whether or not a ramp inspection is indicated, "[i]t may be appropriate to give greater consideration to an aircraft involved in passenger-carrying operations than one limited to cargo only."[165] If an aircraft has been maintained under Part 121 or Part 135, "there may be little need for an airworthiness inspec-

153. *Id.* at par. 8(a).
154. *Id.* at para. 8(b) (emphasis added).
155. This is now Subpart F to Part 91, i.e., 14 C.F.R. § 91.501 (1992).
156. AC 91-37A, *supra* note 131, at para. 8(c).
157. *Id.* at para. 9(a).
158. With the revision of Part 91, this regulation is found at 14 C.F.R. § 91.23 (1992).
159. *Id.* at para. 9(b) (emphasis added.)
160. *Id.*
161. *Id.* at para. 10; para. 10(a), (b).
162. *Id.* at para. 11.
163. Order 8720.1A, *supra* note 132.
164. *Id.* at para. 7(a).
165. *Id.* at para. 7(c).

tion."[166] Conversely, if the aircraft "has been operated as a public aircraft immediately preceding the current lease agreement, consideration should be given to an inspection to determine if the airworthiness certificate is still valid."[167]

Agency employees who conduct the inspection may employ a Ramp/Base Inspection Report or an Inspection and Surveillance Record.[168] According to the Order, a request for an aircraft logbook endorsement or a signed statement that truth-in-leasing provisions have been complied with "MUST BE DENIED."[169] The Order signed by Mr. Hunt concludes with this language:

> The findings of the inspection will dictate what, if any, follow up action is called for. If obvious violations are noted, appropriate enforcement actions should be taken. If there is reason to suspect or anticipate non-compliance with appropriate FARs, it may be necessary to request assistance from another office. This could include meeting the aircraft at its destination or verifying the maintenance program from the office having jurisdiction over the maintenance facility.[170]

H. The Bowen Case Upholding Time-Sharing Under Part 91

In *Administrator v. Bowen*,[171] the FAA brought an emergency action to revoke Captain Bowen's airline transport certificate asserting that he operated 67 "passenger-carrying flights for compensation or hire."[172] It was asserted that Captain Bowen "endangered the lives and property of others"[173] and that he "failed to adhere to the standards of character required of an airline transport pilot . . . ."[174] Further, the Agency asserted violations of, *inter alia*, sections 91.13(a), 135.3(a) and 135.5 of the FARs.[175]

The record demonstrated that Captain Bowen met a local businessman who was interested in buying a corporate aircraft.[176] Captain Bowen assisted the businessman and subsequently created Dominion Bizjets, Inc. ("Dominion") for the purpose of brokering the purchase of aircraft

166. *Id.* at para. 7(d).
167. *Id.*
168. *Id.* at para. 8(a); *see also* FAA Forms 8430-15 and 3112.
169. *Id.* at para. 8(b).
170. *Id.* at para. 9.
171. Administrator v. Bowen, N.T.S.B. Order No. EA-3351 (July 11, 1991). Captain Bowen was represented by Mark T. McDermott, Esq. and Peter J. Wiernicki, Esq. of Joseph, Gajarsa, McDermott & Reiner, P.C. in Washington, D.C., while the FAA was represented by Brunhilda Saunders-Lane, Esq., Cristian Lewerenz, Esq. and John Choate, Esq.
172. *Id.* at 2.
173. *Id.* at 3.
174. *Id.*
175. *Id.* at 4.
176. *Id.* at 6.

and also to facilitate managing, maintaining and flying those aircraft.[177] In the furtherance of Dominion's business, Captain Bowen opened an office, hired a secretary/bookkeeper, as well as several pilots.[178]

As Captain Bowen's reputation concerning the purchase, maintenance and operation of Lear jets grew, other businessmen sought his expertise.[179] In light of the expense of operating sophisticated aircraft, some of Captain Bowen's "clients wanted to find ways to defray some of their operating and maintenance costs."[180] Captain Bowen sought and followed the advice of counsel experienced in aviation matters and "negotiated various agreements for and between his clients, whereby they could recoup some of their expenses."[181]

Captain Bowen negotiated a lease with option to purchase agreement whereby one client could use another client's aircraft over a 6-month period to evaluate the feasibility of purchasing the aircraft.[182] Other clients made oral contracts whereby they could use each other's aircraft.[183] Because one client wanted to make his aircraft available to the public for compensation or hire, Bowen applied for a Part 135 operating certificate.[184] Subsequently, Captain Bowen inserted a clause in management contracts with his clients to the effect "that he would charter their aircraft in accordance with his Part 135 operating certificate."[185] A pilot formerly employed by Dominion contacted the FAA and alleged that Captain Bowen was running a charter operation without a Part 135 operating certificate.[186]

The charges made by Dominion's former employee resulted in the issuance of an emergency order of revocation concerning Captain Bowen's airman's certificate.[187] In addition, three days before issuing the emergency order of revocation, the Agency issued an order of civil penalty directed to Dominion.[188]

Judge Coffman overruled the order of revocation finding that the four flights where Captain Bowen served as pilot-in-command "were Part 91 operations."[189] Further, with reference to the 63 flights which could be

177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 7.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 8.
187. *Id.*
188. See *id.*; Initial Decision of Judge Jimmy N. Coffman, June 5, 1991, appended to the Board's Opinion and Order at 633 [hereinafter Initial Decision].
189. *Initial Decision*, *supra* note 188, at 638.

attributed to Dominion, Judge Coffman opined that "it is this Court's opinion that the 63 flights operated by Dominion Bizjets, Inc. were legitimate Part 91 operations."[190]

In making his findings, Judge Coffman observed that the discretion of a trial judge should be given heavy weight in the context of "credibility decisions,"[191] since the Court sat through three days and nights of trial, heard from 14 or 15 witnesses, and considered some 95 exhibits.[192] With reference to a letter written by Craig Weller, Esq., a former FAA attorney who testified on behalf of Captain Bowen, Judge Coffman made the following observation:

> Perhaps the FAA at headquarters level — I understand this would not be a Region function, but someone at the headquarters level should take Mr. Weller's letter and analyze it and perhaps go into such things in the regulations that I don't think are covered with enough specificity in 91.501. There are obvious items that aren't specifically addressed, such as pilots and pilot services. There's not enough definition as to swap time. There's not anything that I've seen that addresses management companies, aviation management companies. *So this is a grey area.*[193]

Judge Coffman found that based upon the testimony of the FAA's own expert witness, even if the flights were in violation of Part 135, Captain Bowen could be held liable for only four of those flights as the pilot-in-command, since Dominion would have been responsible for all 67 flights as an alleged operator.[194] In addition to adopting Mr. Weller's opinion that "Dominion Bizjets business is perfectly consistent with the requirements of Part 91",[195] Judge Coffman was persuaded that the status of the passengers on the four flights flown by Captain Bowen were persons authorized to be in the aircraft under section 91.501 of the FARs.[196] Additionally, with reference to a demonstration flight, the perspective purchaser did sign an aircraft demonstration agreement.[197]

The Board affirmed Judge Coffman's initial decision overruling the Order of Revocation observing that the testimony of a former FAA regulatory attorney (Mr. Weller) demonstrated that the payments were "the permissible charges an owner can earn from the use of his aircraft by others (and) are limited so that an owner could never earn enough compensation to be tempted to hold his aircraft out for charter to the public."[198] To

190. *Id.* at 638-639.
191. *Id.* at 631.
192. *Id.* at 629-631.
193. *Id.* at 634 (emphasis added).
194. *Id.* at 635.
195. *Id.* at 634.
196. *Id.* at 637.
197. *Id.* at 638.
198. Administrator v. Bowen, N.T.S.B. Order No. EA-3351 (July 11, 1991) at 10.

the extent that the Agency asserted that payment for the flight crew was improper, the Board observed that when former FAR section 91.181 was originally promulgated, it allowed for payment of the salary of the flight crew.[199] When the FAA modified this provision in 1973, it inserted subsection (d), together with 10 subparagraphs, the tenth paragraph authorizing an additional charge equal to 100% of the charges for fuel, oil, lubricants and other additives.[200] The Board observed that "where there is a conflict between the interpretation the FAA advances in a given case in the FAA's articulation of its policy during the genesis of the rule, we will defer to the more authoritative rule making interpretation."[201] Accordingly, the Board reasoned that "the Administrator recognized that expenses including flight crew salaries would be permissible charges provided the expenses did not exceed the 100% formula."[202]

Finally, with reference to evidentiary matters, the Board reasoned that the Agency had made a *prima facie* case of a charter operation by introducing the list of flights.[203] However, once Captain Bowen rebutted the allegation that he was running a charter operation, it was incumbent upon the FAA "to introduce specific evidence which established that these flights were made with passengers whose status took the operation outside of one of the regulatory exceptions, and/or that they were charged amounts that were not permitted by section 91.501."[204]

Because the Agency failed to meet its burden, the Board concluded that the Judge properly dismissed all of the allegations as to Part 135.[205]

The *Bowen* case highlights the ambiguity and uncertainty associated with time-sharing agreements and indicates that the Agency construes deficiencies in its regulations to the detriment of those who pursue literal compliance. Especially troublesome is the notion that after recognizing payment of the flight crew was authorized in the initial promulgation of the time-sharing regulation, the Agency took a "position" in litigation which was contrary to articulated policy appearing in the Federal Register.[206]

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199. *Id.* at 11-12; *see generally* 37 Fed. Reg. 14763 (July 25, 1972) (now codified at 14 C.F.R. § 91.181 (1992)).

200. *Bowen*, N.T.S.B. Order No. EA-3351 at 12.

201. *Id.* at 11.

202. *Id.* at 12.

203. *Id.* at 15.

204. *Id.*

205. *Id.*

206. *See, e.g.*, 37 Fed. Reg. 14763 (July 25, 1972) (the initial promulgation of 14 C.F.R. § 91.181, together with 38 Fed. Reg. 19024 (July 17, 1973), deleting references to payment of the flight crew but adding subparagraph (d)(10) permitting an additional charge not to exceed 100% of the charges for fuel, oil, lubricants and other additives).

I. The Part 91 Protection Afforded by Time-Sharing Is Lost if There Is a Holding Out to the Public to Provide Common Carriage

In *Administrator v. Woolsey*,[207] the airman appealed an emergency order revoking his commercial pilot certificate where the Agency asserted he had violated, *inter alia*, section 91.13(a) of the FARs by serving as pilot-in-command on 53 flights for compensation or hire without the training and examination requirements of Part 135.[208] The airman's defense was that the aircraft was operated under Part 91, specifically FAR section 91.501.

The record demonstrated that Prestige Touring, Inc. ("Prestige") was a Part 125 operator that had carved out a niche in the air transport business by carrying rock-n-roll groups.[209] In 1989, Mr. Woolsey tried to capture the market of country and western entertainers who largely traveled by bus.[210] Mr. Woolsey mailed and faxed brochures of Prestige to those stars soliciting their business.[211] Narvell Blackstock, the husband of Reba McEntyre, testified by deposition that he was very impressed with Prestige's materials,[212] and McEntyre contracted with Prestige to finish up her 1989 tour.[213] Subsequently, she contracted with Prestige for her air transportation for the 1990 and 1991 tours as well.[214]

As part of its evidence, the FAA produced (1) press kits which Prestige sent to more than 1 potential client, (2) an advertisement which Prestige placed in a music industry magazine, (3) a promotional article carried in a music industry magazine, and (4) a yellow pages listing for the company under the caption, "Aircraft Charter".[215]

In furtherance of his argument that the aircraft was operated under a time-sharing agreement, Mr. Woolsey asserted that the name "Shelby's Express" was placed under the pilot's window "because she apparently used the aircraft after each performance to get home to her son, Shelby."[216] Additionally, Ms. McEntyre's personal belongings remained

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207. Administrator v. Woolsey, N.T.S.B. order No. EA-3391 (Sept. 9, 1991). Mr. Woolsey was represented by J. Scott Hamilton, Esq. of Broomfield, Colorado, and the FAA was represented by Tim Duff, Esq. of the Regional Counsel's Office for the Southwest Region. Deputy Chief Judge Jimmy N. Coffman of the N.T.S.B. conducted the trial in *Woolsey* following the trial in *Bowen*.

208. *Id.* at 1-2.

209. *Id.* at 4.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 5.

216. *Id.* at 5.

on the aircraft throughout the term of the lease.[217] Further, the aircraft's registration number was N49RJ, and Mr. Woolsey testified that air traffic controllers referred to the aircraft as "49 Reba Jet."[218] Mr. Woolsey further indicated that the aircraft was based near Ms. McEntyre's home during the term of the lease and he housed his pilots in a corporate apartment nearby so the aircraft would be available for her use at all times.[219] Finally, Woolsey asserted that the charges of Prestige for leasing the aircraft "were only those allowable under FAR section 91.501."[220]

Notwithstanding these assertions, Judge Coffman affirmed the order of revocation because the respondent "failed to meet the threshold requirement of not being 'common carriage'."[221]

Citing AC120-12A, the Board observed that the four elements of holding out to engage in common carriage were satisfied by the record in *Woolsey*. Further, the Board observed:

> As the law judge found in the instant case, there was a "direct, open, obvious solicitation of business for an on-demand air charter", i.e., a holding out. Because of this holding out, Prestige's operations were "common carriage."[222]

Further, the Board observed that the holding out found in *Woolsey* "clearly distinguishes the facts in (*Woolsey*) from those found in *Administrator v. Bowen* . . . ."[223]

The logic of Judge Coffman and the Board in *Woolsey* appears to be correct to the extent that FAR section 91.501 permits operation of "turbojet powered multi-engine civil airplanes of U.S. registry . . . when common carriage is not involved."[224]

J. The "Holding Out" Argument Has Limits

With reference to Part 125 operators, FAR section 125.11(b) provides as follows:

> No certificate holder may conduct any operation which results directly or indirectly from any person's *holding out* to the public to furnish transportation.[225]

In *Go Leasing, Inc. v. NTSB*,[226] the Ninth Circuit Court of Appeals declared that "the term 'holding out' is not so vague as to render the

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217. *Id.*
218. *Id.*
219. *Id.* at 6.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at n.9.
224. 14 C.F.R. § 91.501(a)(b) (1992).
225. 14 C.F.R. § 125.11(b) (1992) (emphasis added).
226. Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986).

regulation (FAR § 125.11) unconstitutional."[227] Although the Ninth Circuit has declared this provision does not violate the Fifth or Fourteenth Amendments, it does have limits. In *Administrator v. C&M Airways, Inc.*,[228] Armadillo and Century Airlines ("Century") were located in Detroit, Michigan, Armadillo being a Part 125 cargo operation which transported automotive cargo for the big three auto makers, i.e., General Motors, Ford and Chrysler, while Century was a Part 121 certificate holder that also specialized in the transportation of automotive cargo. However, Century carried a listing in the Detroit, Michigan yellow pages under the index heading, "Air Cargo & Package Express Service."[229]

Based upon Century's listing in the yellow pages, the Agency brought an action to revoke Armadillo's Part 125 certificate asserting a violation of FAR section 125.11(b) on the theory that Armadillo's operations were tainted, i.e., it "must itself be deemed to have resulted, at least indirectly, from Century's holding out."[230] Seeking to distinguish precedent decided by the Civil Aeronautics Board ("CAB") in the form of Automotive Cargo Investigation,[231] the Agency argued that Century did not have written contracts with auto makers thereby allegedly distinguishing *Automotive Cargo*.[232] However, the Board observed that in *Automotive Cargo*, each carrier had only one contract with the three auto makers and relied on unwritten agreements with respect to the other two manufacturers.[233] Further, the Board observed that in *Automotive Cargo*, "virtually all requests for transportation of non-automotive cargo were declined."[234]

Having concluded that the Agency failed to establish that Century had been engaging in common, rather than private carriage, the Board reversed the initial decision of Chief Judge Fowler in favor of the Agency and observed:

> . . . [W]e find ourselves unable to dispel the impression that this prosecution reflects a belief by the Administrator not so much that respondent's conduct was not permitted by precedent as that the underpinnings of the precedent itself may require re-examination. It seems to us that an enforcement proceeding is not the appropriate forum for the resolution of the purely economic issues a re-examination of the CAB's decision would entail.[235]

After *Armadillo* secured a reversal of Judge Fowler's initial deci-

227. *Id.* at 1525.
228. Administrator v. C&M Airways, Inc., N.T.S.B. Order No. EA-2742 (June 17, 1988).
229. *Id.* at 3.
230. *Id.*
231. Automotive Cargo Investigation, 70 C.A.B. 1540 (1976).
232. *C & M Airways, Inc.*, N.T.S.B. Order No. EA-2742 at 8.
233. *Id.*
234. *Id.*
235. *Id.* at 9.

sion,[236] it sought and obtained an award of attorney's fees under the Equal Access to Justice Act,[237] but the FAA argued that Armadillo's counsel "need not have expended the many hours and great effort it did on behalf of his client."[238] However, the Board found that the Agency's position was not substantially justified in law and in fact and declared that the actions of counsel for *Armadillo* "were necessary and appropriate."[239] Accordingly, the FAA was directed to pay Armadillo $64,983.01.[240]

K. Who Has Operational Control?

According to the FARs, "operational control" means, with respect to a flight, "the exercise of authority over initiating, conducting or terminating a flight."[241] However, this limited or specific definition of operational control appears to have been ignored by the FAA and the Board. In *Administrator v. Gilbertson and Martin*,[242] the Agency asserted false entries were made in flight log sheets to make it appear that airmen were current for purposes of Part 121 operations when they were not.[243] The operations concerned a Douglas DC-6 aircraft, and with respect to a flight of August 1, 1978, Mr. Gilbertson admitted he was not current for purposes of Part 121 on the date of the flight. However, Gilbertson argued that the aircraft had been operated under Part 91 since Pacific Alaska Airlines ("PAIX") had entered into a 6-month lease of the aircraft with Whitney Fidalgo for the purpose of carrying Fidalgo's property.

The lease recited: "Lessee is responsible for the operational control of the aircraft under this lease and lessee certifies that it understands its responsibilities for compliance with the applicable Federal Aviation Regulations.[244]"

Affirming a revocation of Gilbertson's airline transport certificate, the Board stated:

> Notwithstanding the terms of the lease agreement quoted above, it is apparent that PAIX, and not Whitney Fidalgo, was the real operator of the flights. The Board has heretofore held that a lease such as that involved herein does not shift the role of operator to the lessee where the lessor supplied both the aircraft and the flight crew. The FAA has taken the official position as pub-

236. *Id.* at 10.
237. 5 U.S.C. § 504 (1988 & Supp. 1992); *see also* 49 C.F.R. § 826.1 (1992) (rules implementing the Equal Access to Justice Act of 1980 as adopted by the N.T.S.B.).
238. C&M Airways, Inc. v. Administrator, N.T.S.B. Order No. EA-3332 (June 17, 1991) at 8.
239. *Id.*
240. *Id.* at 15.
241. 14 C.F.R. § 1.1 (1992).
242. Administrator v. Gilbertson and Martin, 3 N.T.S.B. 1683 (1979).
243. *Id.* at 1683-1686.
244. *Id.* at 1688.

> lished in an Advisory Circular, that where a lease provides that an aircraft, flight crew, fuel and maintenance are furnished, the lessor is the operator. . . . Inasmuch as PAIX was the operator of the flights under the lease, and was paid at the rate of $4.30 per mile, the flights clearly came within the purview of Part 121.
>
> . . . PAIX continued to own the aircraft, which remained on PAIX's operating specifications, and supplied the flight crews, operating expenses (such as fuel), and maintenance during the period of the lease. The only element of control exercised by Whitney Fidalgo was to direct where and when the flights were to be made and what property and personnel were to be carried. All operational and maintenance decisions remained with PAIX, which in our view, constitutes the type of "control" within the intendment of section 121.155. Even if it is assumed *arguendo* that Whitney Fidalgo was given "exclusive use" of the aircraft, this would not remove the flights from Part 121 since PAIX would still be operating the plane for compensation. It would only mean that PAIX was also in violation of section 121.155.[245]

It would appear that the narrow definition of operational control, which, if adopted, could exonerate airmen in enforcement litigation is abandoned to find connections between the aircraft owner and the aircraft, the express terms of a written contract notwithstanding. Further, if the retention of receiving compensation and making maintenance decisions was the governing consideration in *Gilbertson and Martin*, on what basis was Davis Air Service exonerated in *Graves*?

IV. CONCLUSION

Confusion continues to abound concerning legitimate avoidance of air taxi/air carrier requirements as opposed to illegal evasion of those requirements. As observed by Judge Coffman in *Bowen*, the time-sharing provisions of the FARs present a "grey area" to the aviation practitioner, and those provisions may raise as many questions as they purport to answer.

Armadillo indicates the Agency's orientation to push its authority to the limit and challenge existing precedent by seeking revocation of a Part 125 operator's certificate of authority.

Whether due to confusion or conscious indifference to regulatory requirements, this continues to be a troublesome area. For example, consider the order assessing a civil penalty of $350,000 concerning two Miami companies where the contention was advanced that there had been unauthorized air carrier operations.[246]

The current state of affairs appears to be one in which ambiguities in regulations are construed against airmen and aircraft operators even in

245. *Id.* at 1689-1690.

246. *See Miami Firms Fined, Ordered to Cease Illicit Carrier Operations*, AIR SAFETY WEEK, Vol. 5, No. 11 (Mar. 18, 1991), at 4-5.

the context of situations where they pursue compliance. The cases of *Bowen* and *Jones* illustrate this point.

The marked degree of confusion in this area of the law could be reduced by the Board's adherence to the meaning of terms as they are defined in the Federal Aviation Regulations. If a commercial operator must be "a major enterprise for profit",[247] this should be an essential element of proof in a case where the FAA asserts that an air taxi certificate was required of the airman and/or aircraft operator. The cases where the Board has declared that the pilot need not be shown to have made a profit should be overruled.[248]

To the extent the area of alleged illegal air taxi operations is of concern to the FAA and/or the N.T.S.B., an increased emphasis on education and awareness would appear to be in order. This could be integrated into the flight training of airmen and could also be the subject of discussions at seminars conducted by FAA Accident Prevention Specialists and other FAA inspectors.

As long as amorphous concepts like "operational control" and "holding out" determine who prevails in the context of enforcement litigation, it would appear aircraft operators and their counsel will be called upon to navigate in a troublesome and confusing area. Hopefully, this paper will contribute to an understanding of the problem, if not a solution.

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247. 14 C.F.R. § 1.1 (1992).

248. *See* Administrator v. Lewis, 3 N.T.S.B. 400 (1977); Administrator v. Rountree, 2 N.T.S.B. 1712 (1975); Administrator v. Motley, 2 N.T.S.B. 178 (1973).